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Kansas AFL–CIO and Office & Professional Employees International Union Local No. 320. Case 17–CA–22178

May 26, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND WALSH

On February 23, 2004, Administrative Law Judge Burton Litvack issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record¹ in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,² and conclusions, and to adopt the recommended Order.³

The judge found, and we agree, that the Respondent violated Section 8(a)(5) and (1) of the Act by eliminating a bargaining unit position, the Volunteers in Politics director, and terminating the employee who held that position, Connie Stewart, without providing the Union prior notice and an opportunity to bargain.

Contrary to the Respondent's contention, the record establishes that the Union represented the Respondent's unit employees at the time that Stewart's position was eliminated. In fact, the record shows that the Union has been the collective-bargaining representative of the Respondent's office employees—including employee Stewart—for more than 25 years. The Respondent has deducted dues from these employees' paychecks and remit-

ted those dues to the Union since the early 1990s. Although the Union's business agent visited the Respondent's facility only sporadically over the years, this is largely because the Union authorized the employees to negotiate for themselves in regard to changes in terms and conditions of employment. Thus, over the years, Stewart and the other office employees bargained collectively with the Respondent over terms and conditions of employment, and received the agreed-upon wage raises and other changes in benefits.⁴ In essence, the Union designated the employees as the Union's agent for negotiating purposes. However, the Union remained the principal. And, as noted, the Respondent treated it as such.

Further, the record shows that the Respondent acknowledged the existence of its collective-bargaining obligations when it eliminated Stewart's position. First, the Respondent referenced the requirements of "Article 5 of the office contract" in the termination letter. Second, after the Union's business manager wrote a letter to the Respondent protesting the circumstances of Stewart's termination, the Respondent's executive secretary, Jim DeHoff, did not question the business agent's capacity or status in acting on the employee's behalf. Rather, DeHoff responded to the Union's concerns in a letter that ended by stating that if the Union "still had concerns about the propriety of [the Respondent's] actions concerning the reduction-in-force, please advise. . . ."

With particular emphasis on the facts we cite here, we agree with the judge that the Respondent was obligated to bargain with the Union concerning the elimination of Stewart's position and her termination. We, therefore, adopt the judge's finding that the Respondent's failure to do so violated Section 8(a)(5) and (1) as alleged.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Kansas AFL–CIO, Topeka, Kansas, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

¹ The Respondent's motion for oral argument is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties. The Respondent's motion to reopen the record on the issue of the purported posthearing retirement of Connie Stewart is also denied. We shall leave that issue to the compliance stage of this proceeding.

² The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondent contends that the administrative law judge evinced bias by denying its motion to dismiss for lack of jurisdiction. On careful examination of the judge's decision and the entire record, we are satisfied that the contention is without merit.

³ We shall substitute a new notice to employees to conform to the language in the judge's recommended Order.

⁴ Although the judge found that there existed a 1977 collective-bargaining agreement between the Respondent and the Union, the judge made no finding as to whether there was a collective-bargaining agreement in effect when the Respondent eliminated Stewart's position. The existence of a contract is not critical to our result. The critical fact is the existence of a bargaining relationship in which the Union is the 9(a) representative.

Dated, Washington, D.C., May 26, 2004

Robert J. Battista,	Chairman
Wilma B. Liebman,	Member
Dennis P. Walsh,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT eliminate bargaining unit positions because of reduced work and budgetary concerns without giving prior notice of such to the Union, Office & Professional Employees International Union Local No. 320, and affording it an opportunity to bargain regarding the decision and the effects of the elimination of said positions.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights set forth above.

WE WILL, within 14 days from the date of the Board's Order, offer Connie Stewart full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Connie Stewart whole for any loss of earnings and other benefits suffered as a result of the unlawful elimination of her position.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful elimination of Connie Stewart's job, and WE WILL, within 3 days thereafter, notify Stewart, in writing, that we have done so and that we will not use the elimination of her job against her in any way.

WE WILL, on request, bargain with the Union in good faith about the decision to eliminate Stewart's job and about the effects of that act.

KANSAS AFL-CIO

Michael E. Werner, Esq., for the General Counsel.
A.J. Kotich, Esq. and *Glenn Griffeth, Esq.*, of Topeka, Kansas, for Respondent.
Janice Mammen, Business Agent, of Independence, Kansas, for the Charging Party.

DECISION

STATEMENT OF THE CASE

BURTON LITVACK, Administrative Law Judge. Office & Professional Employees International Union Local No. 320 (the Union), filed the unfair labor practice charge in the above-captioned matter on April 15, 2003.¹ Based upon an investigation of the unfair labor practice charge, on June 27, 2003, the Regional Director of Region 17 of the National Labor Relations Board (the Board), issued a complaint, alleging that Kansas AFL-CIO (Respondent), engaged in, and continues to engage in, unfair labor practices within the meaning of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act). Respondent timely filed an answer, denying the commission of the alleged unfair labor practices. Based upon a notice of hearing, the unfair labor practice allegations came to trial before the above-named administrative law judge on September 4 and 5, 2003 in Overland Park, Kansas. At the hearing, all parties were afforded the opportunity to examine witnesses, to cross-examine witnesses, to offer into the record all relevant evidence, to argue their legal positions orally, and to file posthearing briefs. Each party filed a posthearing brief, and those documents have been carefully scrutinized. Accordingly, based upon the entire record herein, including the posthearing briefs and my observation of the testimonial demeanor of each of the several witnesses, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent maintains an office and place of business located in Topeka, Kansas. While, in its answer, Respondent admitted it is a labor organization, it does not appear that Respondent represents any employees or is an organization in which employees participate, engages in collective bargaining, or assists other labor organizations in collective bargaining. Rather, the record establishes that Respondent, a chartered affiliate of the AFL-CIO, is an unincorporated association, which lobbies on

¹ Unless otherwise stated, all events herein occurred during 2003.

behalf of constituent labor organizations before the legislature of the State of Kansas, engages in political activities by providing financial and other support to candidates for public office in Kansas, and assists its affiliated labor organizations by providing information on candidates for public office and coordinating activities in strike situations. The record further establishes that, as a fee for Respondent's services, each constituent labor organization pays to it per capita dues in the amount of 75 cents per member per month; that substantially all of Respondent's annual revenue comes from the foregoing per capita dues payments; and that, for its fiscal years ending August 31, 2001 and August 31, 2002, the annual per capita dues payments to Respondent by its constituent labor organizations totaled \$383,286 and \$392,612, respectively. The record also discloses that, for the year ending August 31, 2003, International Association of Machinists District Lodge 570 made per capita dues payments to Respondent totaling \$102,000; International Brotherhood of Electrical Workers Local Union No. 394 paid per capita dues in the amount of \$14,765, and United Auto Workers Local Union No. 31 made per capita dues payments totaling \$9,000 and that, during the same time period, District Lodge 570 made monthly per capita dues payments to the International Association of Machinists, whose main office is located in Upper Marlborough, Maryland, in the amount of \$50,000, Local Union No. 394 made monthly per capita dues payments to the International Brotherhood of Electrical Workers, whose office is located in Washington, D.C., in the amount of approximately \$18,000, and Local Union No. 31 made monthly per capita dues payments to the United Auto Workers, whose office is located in Detroit, in the amount of approximately \$85,000. Counsel for the General Counsel argues that the Board should assert jurisdiction over Respondent on three bases—(1) it meets the Board's discretionary nonretail standard for asserting jurisdiction, (2) it represents labor organizations, and (3) it is an affiliated member of a multistate organization. Having considered the matter, I believe that jurisdiction should be asserted over Respondent as, in the conduct of its business operations, Respondent annually exceeds the Board's discretionary indirect outflow, nonretail jurisdiction standard.

In its seminal decision, *Simons Mailing Service*, 122 NLRB 81 (1958), the Board announced that, in response to the Supreme Court's decision in *Guss v. Utah Labor Relations Board*, 353 U.S. 1, 10 (1957), in which the Court had adverted to "a vast no-man's-land" wherein labor disputes were not subject to regulation by any agency or court, it had reappraised its policies and would thereafter expand the reach of its statutory jurisdiction "so that more individuals, labor organizations, and employers may invoke the rights and protections afforded by the [Act]." *Simons Mailing Service*, supra at 82–83. In order to accomplish this expansion of its jurisdiction, rather than employing an ad hoc or case-by-case approach, which might result in confusion and uncertainty as to "where the dividing line[s] [would] be drawn in particular cases," the Board announced that it would utilize revised jurisdictional standards, "simply" drawn and "few in number," for such would significantly reduce the time, energy, and funds necessary to investigate and resolve jurisdictional issues. *Id.* at 83. Moreover, the Board noted, as it is not possible to assert jurisdiction in every case

and over every employer, "its discretion to decline to assert jurisdiction is more reasonably exercised by the utilization of the revised jurisdictional standards" *Id.* at 84. Accordingly, in line with its desire to expand the reach of its jurisdiction and to avoid ad hoc litigation, the Board announced that jurisdiction would be "asserted over all nonretail enterprises which have an outflow or inflow across State lines of at least \$50,000, whether such outflow or inflow be regarded as direct or indirect." *Id.* at 85. Both the Supreme Court and the Board have long held that labor unions should be treated like any other employer with regard to their own employees. *Office Employees Local 11 v. NLRB*, 353 U.S. 313, 316 (1957); *Airline Pilots Assn.*, 97 NLRB 929 (1951). In this regard, during the year ending August 31, 2003, Respondent received per capita dues payments in excess of \$123,000 for its lobbying and political activities on behalf of International Association of Machinists District Lodge 570, International Brotherhood of Electrical Workers Local Union No. 304, and United Auto Workers Local Union No. 31, and, during the same time period, the three labor organizations collectively paid per capita dues in excess of \$50,000 directly to their international unions, each of which is located outside the State of Kansas. Clearly, pursuant to *Carpenters Local 925*, 279 NLRB 1051, 1052 (1986); *Retail Store Employees Local 444*, *Retail Clerks AFL-CIO*, 153 NLRB 252, 253 (1965), and *Laundry, Dry Cleaning & Dye House Workers Local 26*, 129 NLRB 1446, 1446 at fn. 2 (1961), the three above-mentioned labor organizations, when acting as employers concerning their respective employees, constitute employers engaged in commerce within the meaning of the Act. Accordingly, Respondent meets the indirect outflow, nonretail standard for the assertion of jurisdiction by the Board.

Respondent argues that the Board does not have jurisdiction over Respondent or, in the alternative, that it should decline to assert jurisdiction over Respondent given its status as a lobbying/political action organization whose actions are predominantly limited to Kansas. As to its first argument, counsels for Respondent contend that the Board is precluded from exercising jurisdiction over a lobbying/political action organization, such as Respondent, by the first amendment to the Constitution of the United States. In this regard, Respondent relies upon *NLRB v. The Catholic Bishop of Chicago*, 440 U.S. 490 (1979), which concerned the Board's assertion of statutory jurisdiction over teachers in church-operated schools. In ruling that the Board had incorrectly construed the Act to permit it to assert jurisdiction over such entities, the Supreme Court initially noted that "the values enshrined in the First Amendment plainly rank high in the scale of our national values," that "it [was] incumbent on [it] to determine whether the Board's exercise of its jurisdiction . . . would give rise to serious constitutional questions," and that "if so, [it] must first identify 'the affirmative intention of the Congress clearly expressed' before concluding that the Act grants jurisdiction." *Id.* at 510. Thereafter, finding that "our examination of the statute and its legislative history indicates that Congress simply gave no consideration to church-operated schools," the Court concluded "that the Board's exercise of its jurisdiction over teachers in church-operated schools would implicate the guarantees of the Relig-

ion Clauses” of the First Amendment. *Id.* at 504, 507. Then, citing *Buckly v. Valeo*, 424 U.S. 1 (1976), counsel for Respondent notes that the First Amendment offers broad protection to discussion of public issues and debate on the qualifications of candidates of candidates for office and that it protects political association as well as political expression and asserts that there is nothing in the legislative history of the Act establishing that Congress considered broadening the Board’s jurisdiction to cover organizations, such as Respondent, primarily engaged in lobbying/political action activities. Contrary to counsels’ arguments, however, I note that, in *Ohio Public Interest Campaign*, 284 NLRB 281 (1987), the Board decision primarily relied upon by Respondent, the Board specifically refused to adopt the Administrative Law Judge’s decision “. . . to the extent that it [could] be read to indicate that the nature of the Respondent’s activity, i.e., the fact that it is a nonprofit corporation engaged in consumer lobbying, is a basis for declining to assert jurisdiction.” *Id.* at 281. In this regard, in *Ohio State Legal Services Corp.*, 239 NLRB 594 (1978), the Board asserted jurisdiction over an entity, which engages in lobbying the State of Ohio legislature on matters concerning the poor. Moreover, the fact that an organization may be engaged in activities protected by the First Amendment is not itself a bar to the assertion of jurisdiction by the Board. Thus, notwithstanding *The Catholic Bishop of Chicago*, *supra*, the Board has continued to assert jurisdiction over college institutions, with church relationships, where such institutions are primarily concerned with providing secular educations rather than inculcating particular religious values. *Thiel College*, 261 NLRB 580 (1982); *Barber-Scotia College*, 245 NLRB 406, 407 (1979). Moreover, the Board has asserted jurisdiction over an enterprise, which provides cleaning and maintenance services to facilities, owned by the Archdiocese of New York, and over an Italian language school, established by parishioners of the Roman Catholic Church and located on church property. *Casa Italiana Language School*, 326 NLRB 40 (1998); *Ecclesiastical Maintenance Services*, 325 NLRB 629 (1998). Further, in *Associated Press v. NLRB*, 301 U.S. 103 (1937), the Supreme Court found that, as there was nothing to suggest that any infringement upon the guarantees of press freedoms would result, the First Amendment was no bar to the Board’s assertion of jurisdiction over an entity, which is engaged in the collection and dissemination of information and news throughout the world. *Id.* at 131–132. Finally, unlike in *The Catholic Bishop of Chicago*, in which the individuals directly involved in the entities’ First Amendment activities, the teachers, were those covered by the Board’s assertion of jurisdiction, the individuals, who would be covered by the Board’s assertion of jurisdiction herein, Respondent’s office employees, are not those directly involved in Respondent’s First Amendment-privileged activities.

As to Respondent’s alternative argument, that Respondent’s operations are limited to lobbying the State of Kansas legislature on matters affecting only the citizens of Kansas and to supporting candidates for public office in Kansas and, therefore, jurisdiction should not be asserted, its attorneys rely upon the Board decisions in *Ohio Public Interest Campaign*, *supra*, and *Seattle Real Estate Board*, 130 NLRB 608 (1961) for sup-

port. According to Respondent’s attorneys, in both decisions, the Board “clearly disregarded” its discretionary monetary standards and the controlling issues were the “nature” of each organization and the “effect on interstate commerce” of the respective employers. Having carefully analyzed the cited decisions, it is apparent that counsels have misunderstood the import of the cited Board’s rulings. In *Seattle Real Estate Board*, the respondents were real estate brokers primarily engaged in selling residential real estate in the State of Washington with a combined gross annual income in excess of \$2,00,000 [sic]. In the two years during which their business incomes and expenses were examined, for the sale of real estate in Hawaii to Washington residents, one of the respondents received commissions, totaling in excess of \$14,000, from a Hawaiian real estate company. In *Ohio Public Interest Campaign*, the respondent was a State of Ohio company, which provided lobbying services on consumer issues for residents of that state. To that end, the respondent solicited funds directly from residents of Ohio and other entities within the state in order to lobby state legislators on such issues as plant closings, corporate responsibility, tax fairness, and utility regulation. In 1982, the respondent had gross revenues in excess of \$1,300,000 and direct out-of-state purchases totaling \$36,000. Contrary to counsel, in neither case did the respondent meet any of the Board’s discretionary nonretail standards for asserting jurisdiction. I believe that this factor and the absence of discretionary jurisdictional standards for the particular industries involved² forced the Board, in each decision, irrespective of the nature of each business, to undertake analysis of the effect of the business upon interstate commerce in order to determine whether jurisdiction should be asserted over the class of employer involved. Thus, in *Seattle Real Estate Board*, the Board recognized that, while the \$14,000 in commissions paid to it directly from the Hawaiian company may have established “legal jurisdiction” over Respondent, it had “never asserted jurisdiction over the type of business engaged in by the Respondents—that of a real estate broker . . .” *Id.* at 609. In those circumstances, where the respondent failed to meet the discretionary nonretail standard for asserting jurisdiction and where no discretionary standard existed for real estate brokers, the Board considered whether it would effectuate the policies of the Act to establish a specific discretionary monetary standard for that industry and concluded that, as the services of a real estate broker “. . . are rendered primarily at the local level and are therefore essentially local and have at best only a remote relationship to interstate commerce . . .,”³ asserting jurisdiction over that business

² As such effectuates the policies and the purposes of the Act, the Board has asserted, and continues to assert, jurisdiction over classes of employers, which do not meet any of its nonretail standards. For such industries, including, for example, day care centers, cemeteries, and hotels, the Board uses its discretion to establish a monetary standard for the assertion of jurisdiction. *Catholic Cemeteries*, 295 NLRB 966 at 966 (1989); *Salt & Pepper Nursery School*, 222 NLRB 1295, 1296 (1976); *Penn-Keystone Realty Corp.*, 191 NLRB 800, 801 (1971). Usually, for such businesses, the Board requires only more than a de minimus amount of out-of-state purchases for legal jurisdiction.

³ The Board asserts jurisdiction over businesses, which are clearly local in nature, if such meet any of its nonretail standards for the asser-

was not warranted. *Id.* at 610. Likewise, in *Ohio Public Interest Campaign*, the respondent's business failed to meet the Board's discretionary nonretail standard, and the Board had never established a discretionary monetary standard for asserting jurisdiction over employers, primarily engaged in lobbying. Thus, after stating that the nature of the respondent's business (consumer lobbying) was *not* a basis for declining jurisdiction, the Board noted that, notwithstanding whether the entity is a profit or a nonprofit organization, the only basis for asserting or declining jurisdiction would be the effect upon interstate commerce of the respondent's business.⁴ Put another way, as in *Seattle Real Estate Board*, the Board was confronted with whether to establish a discretionary jurisdictional standard for a consumer lobbying organization, such as the respondent, and it concluded "that the nature of the [r]espondent's operations and its impact appear to be almost, if not exclusively, limited to matters concerning issues of public concern affecting Ohio residents and without a general impact on interstate commerce." Therefore, discretionary jurisdiction over that class of employer was not asserted. *Ohio Public Interest Campaign*, *supra*, at 281. Herein, as I have previously concluded that Respondent's business operations meet the Board's indirect outflow nonretail standard for the assertion of jurisdiction, analysis of the effect of Respondent's business operations upon interstate commerce and whether the Board should establish a particular jurisdictional standard for Respondent's type of business is not required. Accordingly, I believe, and find, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

At all times material, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. THE ISSUES

The complaint alleges that Respondent engaged in conduct, violative of Section 8(a)(1) and (5) of the Act, by laying off its employee, Connie Stewart, without prior notice to the Union and without affording the latter an opportunity to bargain with it concerning the layoff or, in the alternative, laying off Stewart without utilizing seniority as required by the existing collective-bargaining agreement between Respondent and the Union. Respondent denies that it engaged in the alleged unfair labor practices, contending that there is no enforceable collective-bargaining agreement between the Union and it.

tion of jurisdiction. Thus, in *Contemporary Guidance Services*, 291 NLRB 50, 51-52 (1988), the Board asserted jurisdiction over a business, which provides services to developmentally disabled individuals in New York City, and which met the indirect outflow, nonretail standard.

⁴ The Board utilized a coincident analysis in *Marty Levitt*, 171 NLRB 739 (1968). Therein, the issue was whether to assert jurisdiction over a bandleader, whose orchestra played mainly club dates. The Board concluded that it was unnecessary to establish a monetary standard for bandleaders or orchestras and that, while the business was essentially local in nature, the test for asserting jurisdiction would be whether the business met a nonretail standard. *Id.* at 741.

IV. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

Respondent, which, on behalf of its affiliated local unions, engages in lobbying of the State of Kansas legislature and provides financial and other assistance to candidates for public office in Kansas, maintains its office and place of business in Topeka, Kansas. The record reveals that Jim DeHoff has been the executive secretary/treasurer of Respondent since 1987; that Will Leiker is its executive vice-president; and that also working in Respondent's office are Karen Maas, the bookkeeper/office manager, and Dona Anderson, a secretary. Further, until March 3, along with Maas and Anderson, Connie Stewart worked in Respondent's office as the Volunteers in Politics (VIP) director.⁵ The record further reveals that, at all times material, Maas, Anderson, and Stewart have been members of the Union and that each became a member upon commencing her job with Respondent.⁶

Connie Stewart testified that she reported for work on the morning of March 4; that DeHoff asked her to come into his office, and that he handed her a letter, dated February 28, which read, in part:

Due to factors in the office that include cut-backs in the volume of work on political activities by the Kansas AFL-CIO because of the National AFL-CIO assuming more responsibility we are eliminating the VIP position. The officers of the Kansas AFL-CIO will handle future political activities. . . .

Under Article 5 of the office contract I am giving you 30 days written notice of reduction of force effective March 4, 2003.

According to Stewart, "[DeHoff] said that he was giving me this letter. That he was going to do a reduction in force, and he was doing away with the VIP position. . . . I said to him, I don't think you can do that, because that is a violation of the Union contract. . . . He said it would be up to me, but I had thirty days. . . ." Stewart continued to insist that DeHoff was acting in violation of the contract, but DeHoff merely replied that he did not want to argue about it. Stewart added that, at one point in the conversation, DeHoff used the term "layoff" but immediately corrected himself, saying "No, it is not a layoff. It is a reduction in force."⁷ Stewart left Respondent's office and

⁵ Regarding her job duties, Stewart worked with local unions on voter registration drives, get-out-the-vote campaigns, and other political matters. In addition, Stewart drafted speeches given by DeHoff, coordinated Respondent's activities with the AFL-CIO offices in Washington, D.C. and maintained Respondent's affiliated union membership list.

⁶ Respondent had employed Stewart for 26 years. Maas and Anderson have been employed by Respondent for 14 and 21 years respectively.

There is no dispute that the amount of each employees' monthly union dues is deducted her paycheck and is mailed directly to the Union. Stewart testified that the employees instituted this system on their own, "but with Jim's approval," in the early 1990's. DeHoff failed to deny this testimony.

⁷ To Stewart, DeHoff was engaging in "semantics" as whatever one terms it, "I am laid off. I have no job."

telephoned Janice Mammen, the Union's business manager and secretary/treasurer. Six days later, on March 10, Mammen wrote to DeHoff, arguing that Respondent's act against Stewart was in violation of article 6 of the collective-bargaining agreement and noting that "the appropriate 30 day notice was not given, otherwise, the employee being laid off would have been allowed to continue to work for that period of time."⁸ DeHoff⁹ responded to Mammen with a letter, dated March 11. In his second paragraph, he wrote that "I proceeded in the manner that I did, upon advice of legal counsel that Article VI of the Agreement (which by the way does not appear to ever have been signed) does not apply to reductions of forces under Section 3 of Article V."¹⁰ Concluding, DeHoff wrote, "If you still have concerns about the propriety of my actions concerning this reduction-in-force, please advise."

Significant issues, with regard to Respondent's elimination of Stewart's position, concern the existence of a bargaining relationship between Respondent and the Union and whether, in fact, on March 4, 2003, a collective-bargaining agreement, between the parties, in fact, existed. In these regards, Stewart began working for Respondent in April 1977. She testified that, at the time, Ralph McGee was Respondent's executive secretary/treasurer and Gretchen Blumenstock was the office manager; that, upon being hired, Blumenstock informed her the Union handled the employees' "contract,"¹¹ and that she was required to join the Union.¹² She added that, in 1977, McGee and Larry Green, a business agent for the Union, negotiated a successor collective-bargaining agreement and that she attended the bargaining "because Larry wanted somebody from the office to be in on all of the negotiations." After initially testifying that the 1977 collective-bargaining agreement was unsigned as "we had one already in the files," Stewart changed her testimony, stating, "Well, I think that they probably did"

execute it. "I think it was probably signed in 1977."¹³ She believed that an old, yellowed copy of this executed collective-bargaining agreement remained in a file, entitled "office contract file," located in Respondent's office file cabinet until, at least, the day her job was terminated by Respondent.¹⁴ After the 1978 contract negotiations,¹⁵ according to Stewart, ". . . Gretchen felt . . . that Ralph was making it an adversarial position and that we would do better on our own, so we talked to Larry and we were given authorization to negotiate the contracts ourselves." Thereafter, commencing in 1979, whenever they desired changes in their terms and conditions of employment, the office employees negotiated on their own behalf with Respondent. Asked if anyone advised Respondent of this authorization, Stewart replied, "Well, I would imagine. I think we would probably have informed Ralph of that. . . . He would have asked about that." Asked if Green ever gave written notice to Respondent of the Union's authorization to the employees to bargain on their own behalf, Stewart said, "I would have thought that they had and that [it] would have been in the file, but I can't swear that was the case." However, during cross-examination, she was definite that the Union's written authorization was in Respondent's office files; that it stated, "We, the employees of the AFL-CIO had authority to negotiate our contract;" and that the document was signed by Green.¹⁶ Stewart testified that Mammen replaced Larry Green as the Union's business agent, and, as to the office employees continuing to bargain directly with Respondent, "we had discussed it with Jan. She knew that we were authorized to negotiate on our own, and she had no problem with it. . . . She told us she had no problem with it."¹⁷ As to whether DeHoff was aware of the Union's authorization to the office employees to directly negotiate with Respondent, Stewart averred, "I don't know what Jan might have told him." Asked if DeHoff ever suggested it seemed odd to bargain directly with the employees rather than

⁸ Stewart filed a grievance over her dismissal by Respondent.

⁹ Three days after he informed Stewart that her job had been eliminated, DeHoff wrote to Respondent's executive board, explaining ". . . that the Kansas AFL-CIO had a reduction in our workforce. Connie Stewart was given 30 days notice . . . in accordance with the terms of the collective-bargaining agreement we are signatory to. . . . it simply did not make sense to continue this position at a time we are facing budget concerns due to massive layoffs."

¹⁰ In his letter, DeHoff wrote that, while he paid Stewart for 30 days, he did not permit her to work during the 30 days after her dismissal because of her asserted "disruptive behavior" after being advised of the reduction in force.

Jerry Helmick, a member of Respondent's executive board, testified that he spoke to DeHoff subsequent to the latter's termination of Stewart and that DeHoff defended his decision, stating, at one point, ". . . that Connie didn't fall underneath the collective bargaining agreement, that she was not a secretary."

¹¹ There is no evidence in the record as to the manner of Respondent's initial recognition of the Union as the bargaining representative of its office employees or, of course, if such recognition was ever extended to the Union. In any event, the General Counsel contends that such recognition was extended in or about 1977 and that such has been embodied in successive collective-bargaining agreements.

¹² The instant complaint defines the bargaining unit, assertedly represented by the Union, as including all full-time and regular part-time employees performing office work in the business office but excluding executives, guards, and supervisors as defined by the Act.

¹³ The collective-bargaining agreement was executed by representatives of Respondent and the Union.

¹⁴ Stewart initially testified that what was in Respondent's file was the "original" collective-bargaining agreement between the parties but later stated she thought it was the 1977 agreement. In any event, she stated that it was "a signed document." According to her, by the time of her layoff, the document was so old, it was yellowed." Counsel for the General Counsel subpoenaed copies of all collective-bargaining agreements for the trial. Karen Maas testified that she and DeHoff gathered documents pursuant to the subpoena but were unable to locate this old, yellowed contract. Mammen testified that the Union does not have a copy in its files. Thus, other than testimony, there is no record evidence as to its existence or its contents.

¹⁵ According to Stewart, Green and McGee were negotiating one-year contracts at the time.

¹⁶ If such a document exists, neither counsel for the General Counsel nor the Union's representative offered it as corroboration of Stewart's testimony.

¹⁷ Asked if Mammen ever authorized Respondent's office employees to bargain directly with Respondent on their own behalf, Dona Anderson replied, "I don't recall an authorization." Asked if, as a group, Mammen ever said they could continue bargaining with Respondent, she replied, "No." Asked if she knew anything about the employees being authorized to bargain directly with DeHoff, Maas said, "No. I guess not. I didn't know we weren't authorized. I mean no one ever talked to me about the contract and I've been there over 14 years."

Mammen, Stewart answered, “No. . . . he told us that he preferred it that way when we talked about the possibility of bringing Jan in.”¹⁸ On this point, Stewart denied that DeHoff ever demanded some sort of authorization prior to bargaining directly with the office employees.

Stewart testified that, since 1979, the direct negotiations between the office employees and Respondent have mostly involved wage increases and, on one occasion, the employees’ paid holidays and vacations. With regard to raises, Stewart recalled that the office employees have received several increases in their rates of pay since 1979 and that the parties did not “necessarily” sit down and negotiate on each occasion; rather, the employees usually presented a proposal to McGee or DeHoff, and they either accepted or rejected the employees’ proposal—“and we would go from there.”¹⁹ For example, in 1999, “we gave Jim a proposal. . . . [He] gave it back to us, and we made a counterproposal on it. We then again gave it to him, and . . . he told us that he wanted to meet with us.” The three office workers and DeHoff then met “in the basement” at Respondent’s office facility. “We had a discussion, and the officers . . . offered us around \$22. We asked to be excused to go upstairs and talk about it . . . and we came back down and we . . . asked for \$30. And they got up and said the offer that was on the table was the last one that we were going to get, and left the room.” The employees accepted \$22 per hour. As to the changes in the employees’ holidays and vacations, these occurred in approximately 1992, and “we negotiated it.” The changes in the employees’ holidays involved a change of days from Columbus Day to Good Friday and the addition of the employees’ birthdays. The vacation changes involved permitting employees to have three weeks of vacation after three years of employment rather than after five years and eight weeks after 20 years of employment. She added that, as the employees’ wage rates were not set forth in the 1977 collective-bargaining agreement, the amounts of any wage increases were never noted on the old collective-bargaining agreement in the

office files. However, as to the holiday and vacation changes, these were handwritten onto the document.²⁰

Stewart, Anderson, and Maas were corroborative that, in approximately 1999, Anderson retyped the contents of the old, brittle collective-bargaining agreement into a computer file, and Anderson identified General Counsel’s Exhibit 3, allegedly a computer print-out of what Anderson typed, as being “very similar,” if not identical, to what she typed into the office computer. According to Stewart, the first time she observed General Counsel’s Exhibit 3²¹ “probably” was in 1999, and she knew “that Dona had retyped [it] . . . from the original contract that was in the files. She retyped [it], and she put changes in that we had negotiated over the years. The original document did not have the same vacations or holidays” Stewart added that Maas asked Dona to retype the contract so that the employees would have a “cleaner” copy. Close scrutiny of General Counsel’s Exhibit 3 discloses that its heading is “AGREEMENT” and that the first paragraph states “This Agreement made and entered into the 16th day of March 1999, by and between Kansas AFL-CIO (Executive Secretary-Treasurer’s Office) . . . and Office and Professional International Union, Local No. 320” There is no record of bargaining between Respondent and the Union in 1999, and, asked the derivation of the March 16, 1999 effective date, Stewart replied that the three employees decided upon the date “because we thought that was the date that we were going to begin negotiating the next time” as that is when “our current contract was due.” She added that, previously, the collective-bargaining agreement was “due” in October, but, as there had been problems regarding raises, “Jim . . . said . . . that meant the contract was dated in March from then on out.”²² According to Anderson, she typed the contents of General Counsel’s Exhibit 3 into

¹⁸ This occurred sometime in the mid-1990’s after the employees experienced difficulty in discussing a raise with DeHoff and mentioned bringing in Mammen to do the bargaining. DeHoff “. . . did not want that done.” DeHoff failed to specifically deny Stewart’s testimony in these regards.

¹⁹ Anderson and Maas corroborated Stewart on the informal nature of the bargaining between DeHoff and the office workers. According to the former, “we never sat down formally and discussed our wage increases.” Rather, the three employees would together decide on what they thought was an appropriate raise and submit it to DeHoff, who “. . . would either approve it or disapprove.” She added that DeHoff would sometimes give the employees a counteroffer, and “there were times when we would maybe counteract the figure.” According to her, “I believe one time we did go to the basement,” but “it really was no different than what we had done in the past on a piece of paper. I just don’t feel that we ever have done true bargaining or negotiating in that office.” Also, the changes in the holidays and vacations were likewise “informal.” Maas, who could not recall the employees ever actually sitting across a table from DeHoff and bargaining, said that, for raises, “the three girls would decide what we wanted to ask him for and sometimes if Mr. DeHoff wasn’t there, I’d write a sticky note or type it on a piece of paper. . . .”

²⁰ As to whether these were initialed by the parties, Stewart was not sure, and Anderson could not recall any initials. However, Stewart testified that any time DeHoff agreed to something in writing, he would place his initials next to it, and the document would be filed.

²¹ Paragraph one of article I of GC Exh. 3 states, “This Agreement shall cover all classifications of office work in the business office of the Employer, except executives.” Article V, section 1 of the document states, “The Employer has the right to lay-off, dismiss, or discharge any employee for sufficient cause, however, the employee or his Union representative shall, upon request, be informed of the reasons for such lay-off, dismissal, or discharge.” Section 3 of the same article reads, “In the reduction of force, employees filling permanent positions shall be given a thirty (30) calendar day notice, prior to such reduction.” Finally, article VI provides that “seniority or length of service shall prevail in all promotions, layoffs, and in rehiring, provided, qualifications are sufficient” and that an employee’s seniority rights are “broken” only if he or she “voluntarily resigns or leaves the employ of the Employer, is justifiably discharged, or refuses to return to work with the Employer within ten (10) calendar days after being requested by the Employer to return to work”

²² Stewart believed that the effective date change resulted from negotiations on the employees’ 1998 raise, which occurred in March, and from DeHoff telling the employees such would “automatically” change the contract date.

DeHoff specifically denied ever agreeing to an effective date for GC Exh. 3 or any other collective-bargaining agreement.

an office computer.²³ “There was an old, brittle [document] in the file and I typed from that. . . . It was very yellowed, very brittle”²⁴ and “we just thought it would be good to have it into the computer so if we needed a decent copy, we would have it.”²⁵ Anderson added that what she typed into the office computer was an exact copy, incorporating all the handwritten changes on the old document. Further, Anderson denied submitting a copy of General Counsel’s Exhibit 3 to DeHoff for his approval and, when asked why she placed the Union’s name on the signature page, she replied, “because I am a member. When we type letters or anything, we put that at the bottom.” Denying that she suggested or instructed Anderson to type General Counsel’s Exhibit 3 into a computer and believing she did not know what Anderson had done until “after the fact,” office manager Maas then recalled seeing an old, yellow document, bearing the heading “Agreement,” in an office file and Anderson copying it into an office computer. Also, Maas recalled seeing a copy of General Counsel’s Exhibit 3 in the same office file. Finally, with regard to General Counsel’s Exhibit 3, no signatures appear on the document, and there is no contention that DeHoff ever executed it on behalf of Respondent.

Turning to Janice Mammen’s asserted contacts with Respondent’s three office employees and with Respondent in her capacity as a Union representative,²⁶ she testified that she assumed her position in 1987 and that, while she has never negotiated a collective-bargaining agreement on behalf of the Union²⁷ with Respondent, “my predecessor . . . informed me that the staff of Kansas AFL–CIO preferred to negotiate the contract on their own”²⁸ and that, “when I initially then went in to visit the staff at the office, I found out that things had always gone very well for them in negotiations.”²⁹ As to the number of

times she has visited Respondent’s office between 1987 and 2003, according to Mammen, “I would say nine or ten times and that, of these 10 visits, “I would say on at least seven or eight occasions I was there pretty much as a representative of the Union” She added that “when I would come in and visit the staff . . . I let it be known to them that . . . if they wanted to go to [DeHoff] with anything, that was fine with me.”³⁰ When asked if she ever advised DeHoff he was authorized to bargain directly with Respondent’s office employees, Mammen said “to the best of my recollection, I don’t recall specifically saying anything . . . like that to him.” Further, other than on behalf of Stewart, Mammen admitted never filing a contractual grievance against Respondent on behalf of an employee.³¹ Nevertheless, Mammen believed DeHoff was well aware of her capacity as the bargaining agent for Respondent’s employees. In this regard, she said that, over the years, DeHoff has never questioned her authority to ask questions about the office employees and, on this point, described a 1996 or 1997 meeting with DeHoff at a banquet in Topeka at which the secretary of the national AFL–CIO appeared. The dinner occurred in a hotel banquet room, and “I specifically recall telling [DeHoff] that I was very much appreciative of the way that he worked with his office staff and how he treated [them]. And I recall telling him that I never had any problems with them because I knew they could always work things out among themselves and that I wished that more of my employers were as good as he was. . . . He said to me that was the way things had always been with them and [that he] had a good staff.” Also, according to Mammen, within the last “couple of years,” she spoke to DeHoff on occasion when they met at meetings of the “Tri-county Labor Council,”³² and “I would ask him if he had any complaints about the staff. He would say, no, do they have any complaints about me? No.” DeHoff failed to specifically deny Mammen’s accounts of their asserted conversations at the Topeka banquet and at the Tri-county Labor Council meetings. Finally, Mammen conceded that she never authorized Stewart, Anderson, or Maas to place the Union’s name on General Counsel’s Exhibit 3.

With regard to Mammen’s representation of Respondent’s office employees on behalf of the Union, Connie Stewart testified that she knew Mammen was a Union business agent and

²³ Article XIII of the alleged collective-bargaining agreement contains the following language regarding the term of the agreement—“If neither party desires a change, then this Agreement shall remain in effect from year to year thereafter.”

²⁴ Anderson did not believe it was signed.

²⁵ The old, brittle contract contained hand-written changes to some of the provisions. Anderson did not believe these had been initialed.

²⁶ Mammen conceded there exists no document designating the Union as the bargaining representative of Respondent’s office employees—“I don’t have any documentation.”

²⁷ The Union has been one of the labor organizations affiliated with Respondent.

²⁸ Mammen conceded not being able to locate an executed collective-bargaining agreement, between Respondent and the Union, in the latter’s files.

Mammen testified that, besides Respondent’s office employees, there are approximately 20 other bargaining units, which are responsible for negotiating their own collective-bargaining agreements. As to these, she added that the Union’s bargaining position is a unique one as her presence during bargaining “makes some labor leaders uncomfortable and they get more argumentative with me than they would with their staff”

²⁹ She recalled being told this by Stewart, Anderson, and Maas in 1987. Given her 14-year tenure with Respondent, Maas could not have met with Mammen in 1987. Clearly, Mammen knew little of the bargaining unit employees’ negotiations with Respondent. Thus, she admitted she never gave advice; the employees never requested assistance, and she did “not always” know what they were negotiating.

Moreover, while claiming she knew the employees received raises once a year, she did not know if these were negotiated raises, and she admitted “I did not receive any copies” of whatever the employees negotiated.

³⁰ According to Mammen, this authority was not limited to bargaining over wages—“They would have been able to negotiate anything that they could.”

³¹ Asked if any employee ever asked her to file a grievance, Mammen could not recall the year but stated, on one occasion, “I came into the office and was talking with the office staff when they mentioned to me that they were having a problem with mice and would I go to Mr. DeHoff. . . . I just kind of laughed and went to Mr. DeHoff and told him that the staff had a concern about the mice in the basement. . . . He . . . indicated that he would have it taken care of.” Both Anderson and Maas denied Mammen’s account of the mice incident.

³² This is an entity comprised of unions, which represent employees located in the five counties of eastern Kansas. The meetings occur in Kansas City.

the employees' bargaining representative because "she has been in the office several times . . .," and "she would just generally come in and ask us if we were having any problems, if there was anything she needed to talk to us about." She estimated Mammen visited the office to speak to the employees "five or six times" in the previous 7 or 8 years. Contrary to Stewart, according to Dona Anderson, she never felt that the Union ever represented her "because [Mammen] has never contacted us to do bargaining." She added, "[Mammen] has been to our office but never discussed . . . our benefits or salaries."³³ In the same regard, Karen Maas testified that, during the years of her employment by Respondent, Mammen has been to the office no more than "three maybe four times" and that these visits have been to speak to DeHoff. Asked if, during these visits, Mammen ever inquired about the employees' working conditions or discussed negotiating, Maas initially replied, "never" but later conceded Mammen "may have said how are you guys doing."

Respondent contends that, at no material time, has there been a collective-bargaining agreement in effect between the Union and it, and Jim DeHoff denied ever being told that Respondent's office employees were represented by any labor organization or anyone ever referring to a collective-bargaining agreement, to which Respondent assertedly was a party, in conversations with him. As to whether he ever met with Jan Mammen to discuss the office employees, while initially replying "not the employees, definitely not," DeHoff later changed his testimony on this point, saying "just the one time I can ever remember anything was . . . in 1987 . . . she did ask about how the office personnel were doing" and, as noted above, failed to specifically deny Mammen's accounts of their meetings since 1987. Concerning his use of the terms office contract or agreement in correspondence, DeHoff replied, "I've always felt like I did have some sort of agreement . . . with the employees in the office and so, when I wrote letters to different people, being from the labor movement, I'd use terms like contract, agreements . . . That's all I knew." On this point, under questioning by me, while denying it was a collective-bargaining agreement, DeHoff admitted that, for the past fifteen and a half years, he has been aware an "unsigned" agreement has been in Respondent's files. Specifically, with regard to General Counsel's Exhibit 3, DeHoff admitted that he "saw it before I gave notice to Connie Stewart [on] the elimination of her position" and that "I had . . . either Dona or Karen dig it out of the files." He explained he asked for the document, which he referred to as the "office contract," as "I was just asking for a document, pertaining to how you lay off someone, eliminate a position,"³⁴ and "I just knew that . . . Dona Anderson went in and typed something on her own and that might be it." Asked if he adhered to its terms, while continuing to fervently deny it was a collective-bargaining agreement, DeHoff responded, "Yeah. What else would I follow?" Further, for matters involving the

office workers' terms and conditions of employment, DeHoff knew to ask ". . . because of the fact that they have always used the document. . . . A document similar to this one . . ."³⁵ However, he denied knowing where the office employees kept the document. Regarding discussions with them concerning their terms and conditions of employment, DeHoff conceded discussing wage increases with the three women, saying, "well, I am sure . . . over fifteen and a half years . . . the four of us . . . would be sitting in the office just discussing what they ought to have . . ."³⁶ As to whether there have been proposals and counterproposals, "the standard thing was there was a lot of verbal talk, like 'Oh, we would like to have five percent.' I would say, 'you know, we don't have to give you five percent,' and that type of thing." With regard to the employees' holidays, DeHoff said that "they have mentioned holidays, but I don't think there was any bargaining over it . . . I have heard comments through the years that Martin Luther King's birthday ought to be a holiday, but it is all said in jest . . ." As to whether he ever negotiated with the employees on vacation pay, DeHoff replied, "I think one time, the two officers decided to give an extra week of vacation, but I am not real positive on that. It has been a few years ago."³⁷

B. Legal Analysis

The complaint alleges that Respondent violated Section 8(a)(1) and (5) of the Act in two aspects—by laying off its employee, Connie Stewart, a mandatory subject of bargaining, without affording prior notice to the Union, which is the collective-bargaining representative of its office employees, and affording it an opportunity to bargain with regard to the decision and its effects or, in the alternative, by failing to continue in effect all the terms and conditions of its existing collective-bargaining agreement with the Union by laying off Stewart without utilizing seniority as required by the collective-bargaining agreement. At the outset, I find, and there is no dispute, that, on March 4, 2003, rather than laying her off, Respondent eliminated Connie Stewart's position and, thereafter, terminated her employment without prior notice to the Union or affording the latter an opportunity to bargain over its decision to eliminate her position and the effects of said act. With regard to the General Counsel's contention that Respondent was obligated to have provided prior notice to the Union and afforded it an opportunity to bargain over its elimination of Stewart's job, counsel contends that, at some point, more than 25 years ago, in some indeterminate manner, Respondent extended recognition to the Union as the collective bargaining representative of its office employees and that such recognition has been embodied in successive collective-bargaining agreements. On these points, the testimony of Connie Stewart is crucial, and, therefore, her credibility is directly at issue. In this regard,

³³ Asked if she knew the purpose of Mammen's visits, Anderson replied, "just to step in and say hello, I guess."

³⁴ Asked if he examined the document, DeHoff admitted, "I looked at [it], but it has been the procedure over the years that the secretaries—due to the fact that there was no negotiations . . . just typed up a document, and I have never signed the document, and so . . . it is not a contract of any sort."

³⁵ DeHoff admitted reading GC Exh. 3 on prior occasions. For example, he admitted scrutinizing the vacation pay provision in early 2001.

³⁶ DeHoff denied the existence of any written authorization from the Union for him to engage in such discussions.

³⁷ Significantly, after conceding Respondent's vacation policy is outlined in GC Exh. 3, DeHoff averred, "it was outlined before I got there, I guess . . ."

I note that she was inconsistent in certain aspects of her testimony, in particular regarding execution of the 1977 collective-bargaining agreement between the parties and the existence of a written and executed authorization from the Union authorizing the employees to engage in collective bargaining on their own behalf, contradicted by Dona Anderson as to whether the old, brittle document, entitled "Agreement," had been executed, and uncorroborated as to other points, including the existence of the aforementioned authorization, permitting the office employees to directly engage in collective bargaining with Respondent. Nevertheless, Stewart's demeanor, while testifying, was that of a veracious witness, and, noting that the events occurred more than 20 years ago, I feel confident in relying upon her uncontroverted testimony regarding the events of the late 1970's. Accordingly, I find that, while there is no record evidence as to Respondent's extension of recognition to the Union as the exclusive bargaining representative of its office employees, at the time of Stewart's hire in 1977, Respondent and the Union were, in fact, parties to a collective-bargaining relationship concerning the former's office employees. This must be so; for, according to Stewart, in 1977, she was informed, upon being hired, that the Union was the office employees' bargaining representative and Larry Green, representing the Union, directly negotiated a successor collective-bargaining agreement, covering the office employees, with Respondent's then executive secretary/treasurer, Ralph McGee. As corroboration, according to Dona Anderson, General Counsel's Exhibit 3 is a replica of the old, brittle document, which, according to Stewart, whom I credit on this point, was a copy of the 1977 collective-bargaining agreement³⁸ and which, according to the latter, Dona Anderson, and Karen Maas, remained deposited in one of Respondent's office files through, at least, March 4. General Counsel's Exhibit 3, in its introductory paragraph, states that the document it is an agreement between Respondent and the Union, and, pursuant to Rule 1004(3) of the Federal Rules of Evidence, I find that the introductory paragraph of the 1977 collective-bargaining agreement between the parties contained the identical language and establishes their bargaining relationship and the Union's representative status.

Moreover, I believe the record evidence warrants the conclusions that, since 1979, the Union has never repudiated its status as the exclusive bargaining representative of Respondent's employees and that Respondent has always been aware of, and continues to recognize, the Union's representative status. In these regards, I am cognizant that the Union has effectively ceded all bargaining responsibility to Respondent's employees themselves and that, over the past 16 years, its current business manager and secretary-treasurer, Janice Mammen, has rarely appeared at Respondent's office to meet with the office employees. Nevertheless, since 1989, Respondent's current executive secretary/treasurer, Jim DeHoff, has permitted the of-

fice employees to deduct the amount of their Union dues from their paychecks and remit said amounts to the Union. Further, I credit Connie Stewart that, in 1979, the Union ceded bargaining responsibility to Respondent's office employees at the behest of the employees themselves, and, DeHoff failed to deny that, in the mid-1990's, after the employees mentioned bringing the Union into negotiations, rather than raising representational issues, he merely said he "preferred" direct bargaining with the employees and "did not want" to bargain with the Union.³⁹ Also, DeHoff admitted speaking to Mammen in 1987 regarding the welfare of Respondent's office employees and failed to specifically deny Mammen's testimony⁴⁰ that, at a 1996 or 1997 banquet in Topeka, she mentioned to him "that I never had any problems with [his office employees] because I knew they could always work things out among themselves and that I wished that more of my employers were as good as he was. . . . He said to me that was the way things had always been with them" Further, DeHoff failed to specifically deny conversations, regarding Respondent's office employees, with Mammen at meetings of the Tri-county Labor Council. Finally, DeHoff's most trenchant acknowledgement of the Union's status as his office employees' exclusive bargaining representative was his March 11 written response to Mammen's letter, questioning the propriety of Respondent's actions regarding Stewart. Thus, rather than questioning Mammen's capacity or status in acting on the employee's behalf, DeHoff responded to all her concerns and ended by stating, "If you still have concerns about the propriety of my actions concerning this reduction-in-force, please advise"⁴¹

In its defense, the attorneys for Respondent assert that "the evidence unequivocally establishes that the Union had abandoned the employees of [Respondent] and/or that Jim DeHoff had reason to believe . . . the Union was defunct in his office" It is apparent that whether the Union abandoned Respondent's employees is a close question. In this regard, it is clear that, after Janice Mammen became the Union's business manager and secretary/treasurer and Jim DeHoff became Respondent's executive secretary/treasurer in 1987, Respondent's office employees continued to represent themselves in bargaining, and Mammen exhibited a seeming, distinct lack of interest⁴² in the concerns of Respondent's bargaining unit employees.⁴³ Thus, the record discloses that, after her appointment,

³⁹ While I acknowledge that neither Anderson nor Maas corroborated Stewart as to what DeHoff said, Stewart was not an inherently unreliable witness, and DeHoff had an opportunity to deny the occurrence of the incident and failed to do so.

⁴⁰ While her demeanor was that of a basically trustworthy witness, I believe Mammen did fabricate portions of her testimony, including the complaints of Respondent's office employees regarding the infestation of mice in their office facility. Neither Anderson nor Maas corroborated her story.

⁴¹ Of course, DeHoff himself admitted to having a conversation with Mammen in 1987 regarding the office employees.

⁴² While the Union's continued representation of Respondent's office employees appears deficient, Mammen's explanation, that her presence makes union officials, who are acting in the capacity of employers, "uncomfortable," appears to be reasonable.

⁴³ Echoing my questions of counsel to General Counsel at the hearing, in their posthearing brief, Respondent's counsels contend that,

³⁸ Stewart's testimony was contradictory as to whether this document was an executed copy of the contract, and Anderson did not believe that it was signed. However, Board law is clear that, when parties have been found to have agreed to the substantial terms of a collective-bargaining agreement, they are bound to said terms even though not reduced to writing. *H.J. Heinz Co. v. NLRB*, 311 U.S. 514 (1941); *Johnson Printers*, 257 NLRB 45, 50 (1981).

she rarely met with and inquired about the concerns of Respondent's office employees, offered them no advice or instructions on bargaining, apparently was unaware of the specifics of any wage increases or other changes in their terms and conditions of employment over the years, and never received copies of any contractual changes. Regardless of the foregoing, there is no record evidence establishing that Respondent's office employees themselves have ever felt abandoned by the Union. On this point, notwithstanding Mammen's paucity of contacts with them, they have continued to have their union dues deducted from their paychecks and remitted to the Union; there is no record evidence that any of the office employees has ever indicated dissatisfaction or expressed to Respondent a desire to no longer be represented by the Union; and they have never sought to decertify the Union as their bargaining representative. Unlike the employees in *White Castle System*, 224 NLRB 1089 (1976), the Board decision upon which Respondent's attorneys rely, given the identity of the employer for whom they work, I am convinced that, had they ever truly felt abandoned by the Union and desired to extirpate themselves from representation by the Union, Respondent's office employees, well aware of their rights under the Act, would have petitioned for removal of the Union as their bargaining representative at some point in the past 25 years. Further, the fact that, during this time period, Respondent's office employees essentially have represented themselves in bargaining is not evidence of abandonment by the Union. In this regard, the Board has held that a bargaining

inasmuch as the bargaining units, described in paragraph 5(a) of the instant complaint and, by dint of Rule 1004(3) of the Federal Rules of Evidence, article I the 1977 collective-bargaining agreement between Respondent and the Union, are not identical, counsel for the General Counsel has failed to establish the "proper" bargaining unit. While the complaint and contractual unit descriptions do not track each other word for word, they are virtually identical. Thus, it is clear that, in both descriptions, included in the bargaining unit are Respondent's office workers and no other employees and that excluded are executives and individuals who would be classified as supervisors within the meaning of the Act. While it is true that guards are not specifically excluded in the contractually recognized bargaining unit, such is not fatal to the finding of an appropriate unit herein. Thus, I believe the General Counsel has proven the existence of a bargaining unit.

Counsels for Respondent also posit that, based upon her job description, Stewart's job may not be included in the bargaining unit or covered by the collective-bargaining agreement. However, said contention is contrary to the record evidence that, for 26 years, Respondent considered Stewart as being included in the bargaining unit. Thus, she participated in bargaining on behalf of the Union in 1977, engaged in bargaining with the other office employees subsequent to 1979, received the same raises as other office employees, along with the other office employees had her Union dues deducted from her paycheck and was covered by the negotiated changes in vacations and holidays, and, on March 4, 2003, was subject to a reduction-in-force pursuant to the terms of GC Exh. 3. Thus, while it may be true that Respondent's executives assumed her job duties after her job was eliminated, Respondent always treated her as a bargaining unit employee, and she shared a community of interests with the other office employees and worked in close proximity to them. Further, contrary to the wording of the contractual bargaining unit, unlike other executives, there is no evidence that Stewart was authorized to hire or discharge. Accordingly, I think that Stewart's job duties were included within the bargaining unit, and I reject counsel's contention.

representative may designate any agent as its bargaining representative (*Ball Corp.*, 322 NLRB 948 at 948 (1997)), and I have previously held that, in 1979, at their own behest, the Union authorized the office employees to represent themselves in bargaining with Respondent. Moreover, I find the record evidence insufficient to warrant a finding that Jim DeHoff⁴⁴ ever believed the Union had abandoned Respondent's office employees as their bargaining representative. Thus, not only did DeHoff himself admit speaking to Mammen in 1987 about the office employees but also I have previously found that, at a banquet in Topeka, Mammen spoke to him regarding the lack of employment "problems" involving the office employees, her knowledge that he managed to "always work things out" with them, and how much she appreciated his excellent relationship with the office employees and that, at meetings of the Tri-county council, they spoke about the office employees. As to whether the Union had ever become defunct as the office employees' bargaining representative, counsel for the General Counsel is correct that the Board's test for such is whether the putative bargaining representative "is unable or unwilling to represent the employees." *Hershey Chocolate Corp.*, 121 NLRB 901, 911 (1958). Herein, there is no record evidence to establish that the Union has ever demonstrated an inability to represent Respondent's bargaining unit employees. Further, at worst, Janice Mammen's behavior discloses a conscious disinclination to interfere with the amicable relationship between Respondent and its office employees, and her above-described meeting with DeHoff and her actions immediately after Respondent terminated Stewart's job demonstrate the Union's clear willingness to assert its status as the bargaining representative when necessary. In these circumstances, I reject Respondent's defense that the Union had become defunct as Respondent's employees' bargaining representative.

Based upon the foregoing, I find that, since at least 1977, the Union has been, and remains, the exclusive bargaining representative of Respondent's office employees, and I have previously found that Respondent failed to give prior notice to the Union and afford it an opportunity to bargain over the effects of its decision to eliminate Connie Stewart's job. The law is well settled that, pursuant to Section 8(a)(1) and (5) of the Act, an

⁴⁴ DeHoff impressed me as being particularly lacking in candor. In particular, I found his testimony regarding his use of GC Exh. 3 and as to whether he ever engaged in bargaining with his office employees, labored, unconvincing, and utterly deceitful. In these circumstances, while there is no record evidence establishing that DeHoff was ever explicitly informed that the office employees had been authorized to bargain on their own behalf, given he admitted speaking to Janice Mammen in as early as 1987 regarding the welfare of the office employees and being aware of the existence of the old copy of the 1977 collective-bargaining agreement for at least 15 years and his approval of a union dues-checkoff procedure for them, I believe he has always been aware his employees were represented by the Union. In these circumstances, notwithstanding the informal nature of any bargaining with the employees, as one experienced in the labor movement, he knew it would have been unlawful for him to have engaged in direct dealing with the employees in disregard of the Union unless they were authorized to do so. In these circumstances, that he continued to meet with them and discuss their wages, holidays, and vacations, in my view, speaks volumes.

employer violates its duty to bargain with the exclusive representative of its employees by unilaterally, without prior notice and affording it an opportunity to bargain, implementing changes in the employees' wages, hours, and terms and conditions of employment—the mandatory subjects of bargaining. *NLRB v. Katz*, 369 U.S. 736 (1962).⁴⁵ As, according to DeHoff's letter to Stewart, Respondent's decision to eliminate the latter's job resulted from "cut-backs in the volume of work" and budget concerns, I believe that Respondent's act was amenable to collective bargaining and, therefore, fell within the second category of management decisions, such as the order of succession for layoffs and recalls, production quotas and work rules, which, as described in *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981),⁴⁶ involve the mandatory subjects of bargaining. *Kajima Engineering & Construction*, 331 NLRB 1604, 1620 (2000); *Winchell Co.*, 315 NLRB 526 at 526 fn. 2 (1994). In this regard, the Board has long considered the elimination of bargaining unit positions as a mandatory subject of bargaining. *Crane Corp.*, 244 NLRB 103, 114 (1979). Accordingly, I find that Respondent eliminated Connie Stewart's position and terminated her employment unilaterally without affording the Union prior notice and an opportunity to bargain about its decision or the effects of its decision and that, by failing to do so, Respondent engaged in conduct violative of Section 8(a)(1) and (5) of the Act. *Kajima Engineering & Construction*, supra; *Crane Corp.* supra.⁴⁷

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. At all times since, at least 1977, based upon Section 9(a) of the Act, the Union has been the exclusive representative for the purpose of collective bargaining of all employees working in Respondent's Topeka, Kansas office; excluding executives, supervisors within the meaning of the Act, and guards.
4. By eliminating Connie Stewart's position and terminating her employment without affording the Union prior notice and an opportunity to bargain over the decision or its effects, Respondent engaged in acts and conduct violative of Section 8(a)(1) and (5) of the Act.
5. The aforementioned unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

⁴⁵ It is clear that the bargaining obligation requires preimplementation notice. *Geiger Ready-Mix Co. of Kansas City*, 315 NLRB 1021 (1994).

⁴⁶ These are subjects, which are "almost exclusively an aspect of the relationship between employer and employee." *First National Maintenance Corp.*, supra, at 676–677.

⁴⁷ Given my finding that Respondent violated Sec. 8(a)(1) and (5) of the Act by failing to provide prior notice to the Union and an opportunity for it to bargain over the effects of its decision to eliminate Connie Stewart's position, I need not consider the General Counsel's alternative contention that Respondent did so in violation of its collective-bargaining agreement with the Union.

6. Respondent has committed no violations of the Act unless expressly found herein.

REMEDY

Having found that Respondent has engaged in, and continues to engage in, serious unfair labor practices, violative of Section 8(a)(1) and (5) of the Act, I shall recommend that it be ordered to cease and desist from engaging in such acts and conduct and to take certain affirmative actions designed to effectuate the purposes and policies of the Act. I have concluded that Respondent unlawfully eliminated Connie Stewart's job and consequently terminated her employment without notice to the Union or affording it an opportunity to bargain over the decision and its effects, I shall recommend that it be ordered, upon request, to bargain with the Union with regard to its decision to eliminate Stewart's job and its effects. As is customary for such violations of the Act,⁴⁸ I shall also recommend that Respondent be ordered to offer to Stewart immediate and full reinstatement to her former position or, if the job no longer exists, to a substantially equivalent position and to make her whole for any loss of earnings and other benefits suffered as a result of its unlawful unilateral action. Back pay shall be calculated in the manner set forth in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest to be computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴⁹

ORDER

The Respondent, Kansas AFL–CIO, Topeka, Kansas, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Eliminating bargaining unit positions because of reduced work and budgetary concerns without giving prior notice of such to the Union and affording it an opportunity to bargain regarding its decision and effects of the elimination of those positions;

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Connie Stewart full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Connie Stewart whole for any loss of earnings and other benefits suffered as a result of the unlawful elimination of her position in the manner set forth in the remedy section of the decision.

⁴⁸ *Kajima Engineering & Construction*, supra.

⁴⁹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful elimination of Stewart's job and, within 3 days thereafter, notify Stewart, in writing, that it has done so and that it will not use its elimination of her job against her in any way.

(d) On request, bargain with the Union in good faith about the decision to eliminate Stewart's job and about the effects of that act.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of back pay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its office in Topeka, Kansas, copies of the attached notice marked "Appendix."⁵⁰ Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 4, 2003.

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated: February 23, 2004

⁵⁰ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

WE WILL NOT eliminate the positions of any of our office employees because of reduced work and budgetary concerns without giving prior notice to their exclusive bargaining representative, Office and Professional Employees International Union, Local No. 320 (the Union), and without affording the Union an opportunity to bargain over the decision to eliminate the position and the effects of that decision.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed to you by Section 7 of the Act.

WE WILL, within 14 days from the Board's Order, offer our employee, Connie Stewart, immediate and full reinstatement to her former job or, if said job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed, and WE WILL make her whole, with interest, for any loss of earnings and other benefits resulting from the elimination of her job.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful elimination of Stewart's job, and WE WILL, within 3 days thereafter, notify her, in writing, that this has been done and that the elimination of her job will not be used against her in any way.

WE WILL, upon request, bargain with the Union in good faith over our decision to eliminate Connie Stewart's position and about the effects of that action.

KANSAS AFL-CIO